



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 17, 2005

Mr. David M. Swope
Assistant County Attorney
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002

OR2005-02298

Dear Mr. Swope:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 220235.

The Harris County Medical Examiner (the "county") received a request for the autopsy, investigation and toxicology reports relating to Mr. Joseph Ruiz. You claim that the requested information is excepted from disclosure under section 552.108 of the Government Code. You also inform us that the requested information is the subject of a prior open records letter ruling. We have considered your arguments and have reviewed the information you submitted.

Initially, we address your representation that the submitted information is the subject of Open Records Letter No. 2004-7365 (2004). In that ruling, we concluded that the county may withhold the autopsy report and the toxicology report concerning Mr. Ruiz under section 552.108(a)(1). You do not indicate, and it does not otherwise appear to this office, that there has been any change in the law, facts, or circumstances on which the prior ruling was based. We therefore conclude that the county may continue to withhold the submitted autopsy and toxicology reports in accordance with Open Records Letter No. 2004-7365 (2004). See Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (attorney general decision constitutes first type of previous determination under Gov't Code § 552.301(a) when (1) precisely same records or information previously were submitted under Gov't Code § 552.301(e)(1)(D); (2) same governmental body previously requested and received ruling;

(3) prior ruling concluded that same records or information are or are not excepted from disclosure; and (4) law, facts, and circumstances on which prior ruling was based have not changed).

We note, however, that Open Records Letter No. 2004-7365 does not authorize the county to withhold the submitted investigator report under section 552.108.¹ We also note that one of the requests that resulted in the prior ruling specifically encompassed the investigator report. You do not inform us, however, and we are not otherwise able to ascertain whether the investigator report was in existence when the county received the prior request for that information. If the investigator report was in existence when the county received the prior request for information, then, because the report was not submitted to this office for our review, the report was required to be released, and it may not now be withheld under section 552.108. *See* Gov't Code §§ 552.007, .301, .302. In that event, as the report is not otherwise confidential by law, it must be released to the requestor. *See id.* §§ 552.021, .221. In the event that the investigator report did not yet exist when the county received the prior request, we will consider whether the county may now withhold the report under section 552.108.

We next note that the county did not comply with section 552.301 in requesting this decision. Under section 552.301(b), the governmental body must ask for the attorney general's decision and state its exceptions to disclosure not later than the tenth business day after the date of its receipt of the request for information. *See* Gov't Code § 552.301(b). Because the county did not request this decision within the ten-business-day period prescribed by section 552.301(b), the investigator report is presumed to be public under section 552.302 and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). The statutory presumption that information is public can generally be overcome by a demonstration that the information is confidential by law or that third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). The county seeks to withhold the investigator report under section 552.108. This section is a discretionary exception to disclosure and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As a general rule, a claim under section 552.108 does not provide a compelling reason for non-disclosure under section 552.302. *See* Open Records Decision No. 586 at 2-3 (1991). However, the interests of another governmental body under this exception can provide a compelling reason for non-disclosure. *See id.* at 3. In this instance, the county's claim is based on the law enforcement interests of the Houston Police Department (the "department"). Accordingly, we will determine whether the county may withhold the investigator report on behalf of the department under section 552.108.

¹We note that the same parties who have interests in the present ruling also were involved in requesting Open Records Letter No. 2004-7365 and had notice of, and the opportunity to assert their interests in, the requested information that was the subject of the prior ruling.

Section 552.108 excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You state that the department has informed the county that the department objects to the release of the investigator report because its release would interfere with a pending criminal investigation. We note that section 552.108 may be invoked by any proper custodian of information relating to an incident involving alleged criminal conduct that remains the subject of investigation or prosecution. *See* Open Records Decision No. 372 at 4 (1983) (addressing statutory predecessor). Therefore, based on your representation, we conclude that the county may withhold the investigator report under section 552.108(a)(1). *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

In summary: (1) the county may continue to withhold the autopsy and toxicology reports in accordance with Open Records Letter No. 2004-7365 (2004); (2) if the investigator report was in existence when the county received the prior request for the report, then the report may not be withheld under section 552.108 and must be released; (3) if the investigator report was not in existence when the county received the prior request, then the county may withhold the investigator report on behalf of the department under section 552.108(a)(1).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body

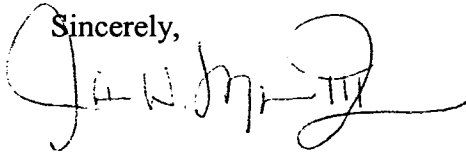
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 220235

Enc: Submitted documents

c: Ms. Kathy Kelley
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(w/o enclosures)